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No. 377

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1966

DR. GEORGE BETO,
Director of Texas Department of Corrections,
Petitioner,

v.

EUGENE WELCH,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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Question Presented

Was it a denial of due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States, for the state court to refuse a sanity hearing to one subject to the death penalty where the state provides by statute for such a hearing, the application for the hearing was supported by expert evidence that the prisoner was insane, and no evidence to the contrary was presented to the state court?

Statement of Case

In most respects petitioner's statement of the case is acceptable to respondent. Respondent cannot accept, however, petitioner's repeated assertion that the refusal of the state trial judge to order a sanity hearing "was upheld by the Texas Court of Criminal Appeals." (Pet. 5, 7.) Two separate applications for a sanity hearing are here involved. On January 21, 1964, respondent moved for a sanity hearing under article 932b, § 3, of the Texas Code of Criminal Procedure then in force, which authorized such a hearing after conviction and prior to sentence. The motion was supported by an affidavit of Dr. David T. Wells, a psychiatrist, who had examined respondent on several occasions, including that very day. The motion was denied. On February 4th, 1964, the Court of Criminal Appeals refused to entertain an appeal from this denial on the stated ground of "want of jurisdiction." (Tr. 43-44.) This is consistent with the stated Texas view that appeal will not lie from a preliminary insanity hearing, *Pena v. State,* 167 Tex. Cr. 406, 407-408, 320 S.W. 2d 355, 356-357 (1959), *Bush v. State,* 172 Tex. Cr. 54, 57, 353 S.W. 2d 855, 857 (1962), and with the unpublished statement by the clerk of that court that "the Court takes the position that no appeal lies from a post-conviction insanity hearing." Petition for Certiorari, *Bush v. Texas,* No. 877 Misc., O.T. 1963, p. 10, quoted at Transcript 104. Thus it can hardly be said that the Court of Criminal Appeals "upheld" the denial of the January 21st motion.

After respondent was sentenced to death, he moved again, on February 29th, 1964, for a sanity hearing, this time proceeding under art. 932b, § 4, of the Texas Code of Criminal Procedure then in force, which authorized such a hearing for those under sentence of

death. This motion was denied the day it was filed; habeas corpus was sought from the Court of Criminal Appeals on March 3d and denied on March 4th. (Tr. 48.) The most likely interpretation of the denial is that habeas corpus is not available in Texas to review denial of a sanity hearing. The petitioner has cited no authority to show that denial of the application was a decision on the merits, no such case is known to counsel for respondent, and *Ex parte Elkins,* 168 Tex. Cr. 117, 324 S.W. 2d 1 (1959), strongly suggests, if it does not hold, that such collateral remedies as habeas corpus are not available in Texas for those who claim insanity after conviction.

Argument

The decision below was clearly right. It is not in conflict with, but is compelled by, decisions of this Court and of other courts of appeals. The court below found it unnecessary to decide whether there is a constitutional right not to be executed while insane. Since Texas commendably gives such a substantive right by statute, the court of appeals held that it is constitutionally required to observe the fundamentals of due process in applying the state statute. As there was far more than a prima facie showing that respondent was insane, and no evidence whatever to the contrary, refusal of a sanity hearing was a denial of due process under the familiar rule of *Thompson v. City of Louisville,* 362 U.S. 199, 206 (1960).

The present case was decided before this Court decided *Pate v. Robinson,* 383 U.S. ____ (1966), but the result here follows a fortiori from *Robinson.* There was no question in *Robinson* as to the constitutional adequacy of the procedures provided by the Illinois statutes but only as to their application. As the Sev-

enth Circuit said in the *Robinson* case, "this procedure satisfies the requirement of due process; to deny the established procedure to a particular accused, however, is a denial of due process." 345 F. 2d 691, 695 (7th Cir. 1965). Illinois law required a sanity hearing whenever a bona fide doubt was raised as to a defendant's sanity at the time of the trial. The Illinois Supreme Court, interpreting this state test which is similar to the test of the Texas statutes involved in the present case, had thought no facts were brought to the trial court's attention sufficient to raise a bona fide doubt as to Robinson's sanity. This Court held, however, that the evidence introduced on Robinson's behalf entitled him to a hearing on the issue of his sanity, even though he had not requested such a hearing, and that failure of the trial court to hold a sanity hearing was such a denial of Robinson's constitutional rights as to entitle him to a writ of habeas corpus. In the present case the uncontradicted showing of insanity was far stronger than in Robinson's case.

In *Robinson* this Court cited with approval *Thomas v. Cunningham,* 313 F. 2d 934 (4th Cir. 1963). In *Thomas* the Fourth Circuit praised the "humane legislation" by which Virginia provides for pre-trial mental examination of an accused, but said that "the federal court is obliged to scrutinize the procedures by which" a particular defendant's claim for such an examination was rejected. Since "reliable and uncontroverted sworn medical testimony" supported the prisoner's claim of insanity, the trial court's refusal to order a mental examination "was so arbitrary as to constitute a denial of due process." *Id.* at 939-940. Indeed Thomas was ultimately ordered released. *Thomas v. Cunningham,* 335 F. 2d 67 (4th Cir. 1964). See also *Snider v. Peyton,* 356 F. 2d 626, 628 (4th Cir.

1966), directing the district court on habeas corpus to consider a prisoner's claim that his constitutional rights had been denied by failure of the state court to hold a hearing on whether he should not be executed because he was presently insane.

In *Irvin v. Dowd,* 366 U.S. 717, 721-722 (1961), this Court said that states are not constitutionally required to give a jury trial in criminal cases, but held that if they do, the trial must be fair and the verdict of the jurors must be based upon the evidence developed at the trial. This is precisely the principle of procedural due process which petitioner now attacks.

Petitioner misconceives the holding below when he repeatedly asserts that it would permit review on habeas corpus of "mere procedural errors, instead of violations of fundamental constitutional rights." (Pet. 17.) Most state errors are now unreviewable, and will remain so if the decision below stands. It is only where the state error is of constitutional dimension—as, here, in making a finding supported by no evidence whatever—that federal intervention will be possible.

On the view taken by petitioner, a federal court could give no relief if the state judge had refused a sanity hearing because an armed mob was in control of the courtroom, demanding respondent's execution. Surely the Great Writ and the Fourteenth Amendment are not so puny.

Conclusion

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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